

## Who is the Client? Ethical Issues in an Elder Law Practice

By  
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The practice of Elder Law is on the rise. More and more attorneys are becoming aware that a significant portion of our population is considered elderly. The baby boomers continue to age and because of the size of that particular cohort, within the next ten to twenty years, an even larger portion of our population will be “elderly.”<sup>1</sup>

Keeping pace with this population shift, the law has responded to the legal needs of the segment of the population considered “old.” Elder law is now recognized as a firmly established practice area. The ABA has recognized a certification in elder law.<sup>2</sup> Many states have sections of their bars devoted to elder law. The University of Illinois has the *Elder Law Journal* and Marquette, *Elder’s Advisors: Journal of Elder Law*. The ABA General Practice and Tort and Insurance Law Sections have committees that address issues related to the legal problems of the elderly. The ABA has the Commission on Legal Problems of the Elderly, and the National Academy of Elder Law Attorneys now has over 3,500 members.

The practice of elder law did not spring up overnight. A number of attorneys were practicing elder law over 20 years ago,

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<sup>1</sup> See Administration on Aging, 1999 Census Estimates of the Older Population, for States Older Population by Five Year Age Groups (last modified July 1, 1999) <<http://www.aoa.dhhs.gov/aoa/stats/99pop/popx5.html>> and *Aging Into the 21<sup>st</sup> Century* (visited August 6, 2000) <<http://www.aoa.dhhs.gov/aoa/stats/aging21/summary.html>>.

<sup>2</sup> The National Elder Law Foundation is the certifying entity for Elder Law Certification.

but primarily as legal service attorneys. In private practice, some components of an elder law practice were found in trusts and estates practices. Yet, elder law is more than just a trusts and estates practice.

Elder law attorneys describe elder law as a general practice within which they “specialize.” Talking to those who hold themselves out as elder law attorneys, one will find a variety of practices. Some attorneys may practice only nursing home plaintiff litigation. Others have a significant guardianship practice, and still others focus the majority of their practice on planning for incapacity and paying for long-term care (also known as Medicaid Planning.)

The nature of the elder law practice lends itself to thorny ethical issues. Because of the nature of the practice, many times there is more than just one person involved in the client-attorney relationships, requiring the attorney to make clear “who is the client.” It is not unusual for the family to be involved in the elder’s life, trying to resolve problems encountered by the elder family member. The attorney must be absolutely clear about who is the client.<sup>3</sup>

Several scenarios are useful in obtaining a clear picture of the ethical problems that may arise in determining who the attorney represents. First, this essay will discuss the dilemmas arising when an elderly husband and wife are seeking estate planning. Another scenario this essay will explore is an elderly person accompanied to the interview by either a friend or a family member, and a variation on it, when that third person “speaks” for the client. Another scenario involves a family member or another contacting the attorney on behalf of the elderly client and asking the attorney to take specific actions. Even if the client is alone with the attorney, the family may feel they’re “entitled” to know what’s going on because they only have the elder’s best interest

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<sup>3</sup> There are many ethical problems encountered in an elder law practice. This article focuses on the different situations encountered in answering the question, “Who is the client?” As a result, this article will focus on MRPC Rules 1.6, 1.7, 1.8 and 1.14, although other rules may come into play. This article is not an exhaustive discussion of all of the ethics problems or a discussion of the literature on those problems. The most exhaustive discussion is the ACTEC Commentaries on the Model Rules of Professional Conduct (3rd ed. 1999).

at heart, or the family may feel they are paying the bill and have “bought” the information.<sup>4</sup>

## I. Husband and Wife — Joint Representation

A frequently encountered situation under the subject who is the client is spousal representation. Assume spouses, Harry and Mary, come to the attorney for estate planning services. Assume, for example, that in the interview Harry and Mary tell the attorney that they wish to have reciprocal wills prepared, leaving everything to each other. On the death of the surviving spouse, the estate goes to the children in equal shares. The attorney agrees to draft the will, the clients sign the retainer, the attorney gets all the necessary information and the clients leave. The wills are subsequently prepared and signed, the attorney keeps a copy on file and the originals are given to the clients. Some time passes and the attorney receives a call from Harry who tells the attorney that he wants to draft a codicil to his will to add as a beneficiary, a child that he has had out of wedlock with his mistress, but under no circumstances is the attorney to advise Mary of the change in the will or the existence of the illegitimate child.<sup>5</sup>

Now the attorney is faced with several difficult questions: Can the attorney represent Harry and make the requested change? Can the attorney continue to represent Mary? Can the attorney disclose the confidence to Mary despite Harry's instructions? Can the attorney continue to represent either party once Harry has made the disclosure to the attorney? This is really not an unusual scenario and one that can happen fairly easily without any warning.

The attorney quickly pulls out the ethic rules, looking for some help. Model Rule 1.7 “Conflict of Interest: General Rule” provides:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

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<sup>4</sup> “Who is the client?” is also a relevant question in fiduciary representation. That topic, however, requires an exhaustive examination beyond the scope of this article. Therefore, that topic will not be addressed. The reader is referred to the ACTEC commentaries at 125-128, 219-220 for readings on this subject.

<sup>5</sup> For an example of this scenario, see Fla. State Bar Association Comm. on Professional Ethics Op. 95-4 (1977).

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(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.<sup>6</sup>

Most useful to the attorney is Comment 13 to Rule 1.7, which gives guidance for estate planning and estate administration, recognizing that conflicts might arise in the representation of multiple family members.<sup>7</sup>

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon circumstances, a conflict of interest may arise.<sup>8</sup>

This conflicts situation may have been avoided if at the beginning of the representation, the attorney disclosed to Harry and Mary the potential for a conflict of interest, and required the execution of a joint representation agreement that clearly prohibited any privileged communication between the parties with regard to the transaction for which the attorney is retained, as well as a waiver of any conflict of interest. Without the agreement, the attorney is not, without more, allowed to share information between Harry and Mary.<sup>9</sup>

The above scenario is not the only multiple-client one an attorney will encounter. Confidentiality is considered a fundamental principle of the client-attorney relationship.<sup>10</sup> As a result, when representing multiple clients such as family members, the attorney may not be able to share the information between the

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<sup>6</sup> Model Rules of Professional Conduct Rule 1.7 (1999), hereafter MRPC.

<sup>7</sup> MRPC Rule 1.7, Cmt. 13.

<sup>8</sup> *See id.*

<sup>9</sup> *See, e.g.*, Fla. State Bar Association Comm. on Professional Ethics Op. 95-4 (1997).

<sup>10</sup> MRPC Rule 1.6, and the comments thereto.

parties even, as shown above, when they're husband and wife. The American College of Trust and Estate Counsel (ACTEC) Commentaries recommend that the attorney, at the first consultation, review with the multiple potential clients the terms of the representation, including the sharing of information. Although not required, the terms of the sharing of the information should be committed to writing.<sup>11</sup> The attorney should consider separate interviews with each prospective client which facilitates the revelation of conflicts of interest.<sup>12</sup>

Although some attorneys take the position that representation of multiple clients on a related legal matter implies the sharing of information among the clients only regarding the subject of the representation,<sup>13</sup> others treat the clients as separate clients and do not share confidential information among them.<sup>14</sup> However, this will strain the attorney's impartiality and loyalty, although consents under Rule 1.7 might alleviate the difficulties with which the attorney is faced when the clients' interests begin to diverge.<sup>15</sup>

The duty of loyalty is another critical element in the client-attorney relationship.<sup>16</sup> The Comments to Rule 1.7 recommend that the attorney adopt procedures that are reasonable and appropriate for both the size of the firm and the type of practice, including a conflicts check system.<sup>17</sup> If Harry would consent to the disclosure to Mary, one of the ethical problems facing the

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<sup>11</sup> ACTEC Commentary on MRPC Rule 1.6 at 119.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 119-120.

<sup>15</sup> *Id.* at 120. In an elder law practice, one of the family members may have diminished or questionable capacity. The client with questionable or diminished capacity raises the issue of the client's ability to consent, which is beyond the scope of this writing.

<sup>16</sup> MRPC Rule 1.7, Cmt 1.

<sup>17</sup> *Id.* Comment 1 provides:

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

attorney would be removed. Assuming Harry refuses to consent, the attorney would not be able to reveal any information. It is clear under Rules 1.6 and 1.7 that disclosing the existence of the illegitimate child to Mary would be directly adverse to Harry. Therefore, according to Comment 5 to Rule 1.7, if a “disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer . . . cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”<sup>18</sup>

Since Harry refuses to allow the disclosure, the lawyer is now in a position of conflict in the future representation of Mary. Since the attorney cannot disclose the information to Mary, the attorney, at a minimum, is going to need to advise Mary to seek separate counsel. Of course, that will put Mary on notice that something is going on, and she will likely inquire of the attorney, “Why not?” Since the attorney cannot reveal the information to Mary, then the attorney should no longer represent either Harry or Mary.<sup>19</sup>

The Florida Bar issued an ethics opinion that offers guidance on this issue. Ethics Opinion 95-4 addressed facts similar to the above situation and concluded that preserving confidential information was more important than communications with clients. Although the attorney in the hypothetical would not be required to obtain a joint representation agreement from Harry and Mary at the outset, the duty of confidentiality would take

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<sup>18</sup> MRPC 1.7, Comment 5, provides:

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

<sup>19</sup> See, e.g., Fla. Ethics Op. 95-4 (1997); See MRPC Rule 1.6.

precedence over the duty of communications. The Ethics Opinion indicated that the attorney should withdraw, not further represent either party and not divulge any communications.<sup>20</sup> Applying the Florida opinion to this hypothetical, the attorney could not prepare Harry's codicil and would have to advise Harry and Mary that she could no longer represent either of them, without telling Mary the reason.

The New Jersey Supreme Court dealt with a similar estate planning conflicts case that added an interesting twist. In *A. v. B.*,<sup>21</sup> the law firm represented the husband and wife in estate planning, as well as the petitioner, A, in a paternity action against the husband, B. A's illegitimate child was unknown to the law firm and the wife, and the firm's computer check did not uncover the conflict.<sup>22</sup> Once the firm discovered the conflict, it withdrew from the paternity action. The firm sought to disclose the illegitimate child to the wife, but was added as a third party to the paternity action by the husband in an effort to prevent the disclosure.<sup>23</sup> The husband and wife had signed a "Waiver of Conflict of Interest" at the beginning of the representation.<sup>24</sup> The firm was retained by the husband and wife prior to A retaining the firm. The husband and wife signed their wills after the paternity action was filed.<sup>25</sup> The firm advised the husband of its belief that it had an ethical obligation to disclose the child's existence to the wife and the effect the child's existence would have on her estate plan.<sup>26</sup>

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<sup>20</sup> Fla. Ethics Op. 95-4 (1997). For a detailed discussion, See ACTEC commentary on Rule 1.7 149-150 (3d Ed. 1999). For a discussion of the issues and differing approaches, See generally, Russel G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 *FORDHAM L. REV.* 1253 (1994). A review of MRPC Rule 2.2 may be useful, although at this writing the ABA Ethics 2000 Commission is recommending the elimination of Rule 2.2.

<sup>21</sup> *A. v. B.*, 726 A.2d 924 (N.J. 1999).

<sup>22</sup> *Id.* at 925. The clerk who opened the estate planning file misspelled the last name of the husband and wife, thus allowing the conflict of representing adverse parties to occur.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 925-926.

<sup>26</sup> *Id.* at 926.

The New Jersey Supreme Court found that the law firm could inform the wife of the child's existence because of New Jersey Rule 1.6.<sup>27</sup> New Jersey Rule 1.6 provides for broader disclosures than the Model Rules.<sup>28</sup> Additionally, the disclosure was appropriate because the firm learned about the child from a third party, not the husband, and because of the waiver signed by the spouses.<sup>29</sup> The lesson learned from this (other than the value of an accurate conflicts check) is the importance of the routine use of waivers when representing spouses.

The ACTEC Commentaries take the position that it is appropriate for a lawyer to represent more than one member of a family in connection with estate planning, as well as others in different capacities.<sup>30</sup> The commentaries recommend either prior to or shortly after starting representation, the lawyer discuss with the clients the implications of representing them jointly, the extent to which information would be shared and the possibility of withdrawal when and if a conflict develops.<sup>31</sup> The earlier the better, and probably the best approach would be to have the discussion at the outset.

In example 1.7-1 of the Commentaries, the lawyer is asked to represent the husband and wife to prepare an estate plan. The example provides that at the beginning of the relationship, the lawyer should discuss the terms under which the lawyer would represent both spouses. The commentary indicates that there are lawyers who believe that it is only appropriate to represent the spouses as "joint clients," and as such, the attorney could not maintain confidentiality of any information that might be considered relevant to the representation.<sup>32</sup> The example notes, however, that there are experienced attorneys who believe that the spouses can be represented as separate clients with the presumption of confidentiality, but this may vary from jurisdiction to ju-

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<sup>27</sup> *Id.* at 930.

<sup>28</sup> New Jersey Rule 1.6 permits the disclosure necessary to redress the client's "fraudulent act in furtherance of which the lawyer's services had been used." *Id.* at 927.

<sup>29</sup> *Id.* at 927-931.

<sup>30</sup> ACTEC Commentary on MRPC Rules 1.6 and 1.7, 119-22, 149-150 (3d Ed. 1999).

<sup>31</sup> *Id.* at 119-121, 150-151.

<sup>32</sup> *Id.* at 152.

risdiction.<sup>33</sup> The commentary also provides that in the case of representing the husband and wife as separate clients, such representation should be undertaken only when the clients consent, after disclosure of the ramifications of such representation.<sup>34</sup>

In Montana, the ethics committee issued an opinion on whether “a couple’s estate attorney [had to] disclose a potential conflict.”<sup>35</sup> The short answer was no, absent an existing conflict or evidence that the lawyer’s independent professional judgment would be compromised, but the opinion recommended the use of a written conflicts waiver.<sup>36</sup> The opinion noted that a marriage is not adversarial in many cases, and thus there is no inherent conflict in the representation of both spouses.<sup>37</sup> The opinion found that a “conflict occurs when both spouses disagree on issues in which only one spouse can succeed.<sup>38</sup>” The opinion noted that lawyers must be sensitive to the “changing goals and interests” of the spouses; to do so requires flexibility on the lawyer’s part.<sup>39</sup> Remember that without the appropriate consents, Model Rule 1.6, “Confidentiality of Information,” is going to prohibit disclosures of information to one spouse that the attorney received from the other. One thing can be concluded from the above, the best practice in spousal representation is to obtain written waivers at the outset.

## II. Who’s in the Room?

It is clear from the above discussion that a conflict of interest could easily arise in an estate planning situation. But there are also potential conflicts of interests outside of the estate planning area. For example, the elderly person may come to the interview with someone else—a friend or family member. Although the attorney may be under the impression that the elderly person is the client, what happens when the elderly person has the other indi-

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Mont. Ethics Op. 960731 (1996).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* See also ACTEC Commentaries at 172 for a discussion of the Montana Ethics Opinion.

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vidual accompany her into the room for the interview? Who is the client then?

Say, for example, Estella is accompanied to the interview by her youngest daughter, Roberta. When the attorney goes to the waiting room to escort Estella back to her office, Estella indicates that Roberta will be in the interview as well. Immediately, there is an issue of confidentiality. There is no client-attorney privilege with the third party who is present in the interview.

When an attorney explains the topics of confidentiality and conflicts to the client, the best approach is for the conversation to occur only between the client and the attorney. Assume the client understands these issues and agrees to meet with the attorney alone. If so, the attorney is in good shape, as the attorney clearly knows who is the client and can be assured that the client in her office is informed about confidentiality and conflicts of interest.

But what happens when the client refuses to have the conversation outside the presence of the third party? The attorney still has to have the routine conversation with the client about confidentiality issues surrounding the establishment of the attorney/client relationship. This conversation, however, because of the client's refusal, occurs in the presence of a third party.

How can the attorney clearly know that the client's statements and decisions are made freely and voluntarily if someone else is present? Without knowing more about the dynamics between the client and the third party, it could very well be that the third party is there to ensure that the client does things the way the third party wants. Worse, the third party may be participating in the conversation. If the attorney cannot verify to her satisfaction that the client's directions and decisions are actually those of the client, then the attorney may find that during the course of the conversation, the attorney simply has to terminate the conversation and cannot represent the client. If there is no client-attorney relationship, the attorney cannot undertake the representation. Can the attorney reschedule the interview to another time on the condition that she meet with the client alone? Absent the ability to make the necessary determination about the client, the attorney would be well advised to proceed no further.

### III. Look Who's Talking

Attorneys have to be prepared for not only the presence of the third party in the interview, but the third party participating in the interview. Estella may explain to the attorney that Roberta knows “exactly” what Estella wants, or can explain it “better” than Estella. When this kind of situation occurs, the attorney is really in a difficult situation.<sup>40</sup> It is hard to ascertain at that point if Estella is truly speaking from her own free will and that what is being related by Roberta as the wishes of Estella is accurate. Further, if Estella cannot speak for herself, there may be an issue of Estella's capacity.

Sometimes an explanation of the requirement that the client answers the questions and provides the information will be sufficient to rectify this problem. The attorney may need to have subsequent interviews with the client to determine the client's perceptions and desires, to make sure that what the attorney was told by the third party was truly that of the wishes of the client. However, if the attorney ultimately cannot be satisfied that the client's wishes are those expressed by the third party, the attorney should not undertake the representation.

Roberta, who is Estella's youngest daughter, sits in on the interview at Estella's insistence. Estella wants to change her will. Estella tells you, as a lawyer, that her other two children have not paid any attention to her, live out of town, and have no contact with her, so she wants to change her will from leaving everything to her three children equally to leaving everything to Roberta because Roberta has been taking care of her. If Roberta is present in the room, how can you be sure that this is truly Estella's wish, as opposed to something that she has told Roberta she would do, and really doesn't want to do, or that Roberta has told her to do, “or else?” Because Roberta is present, Estella may not want to hurt her daughter's feelings. A worse case scenario could occur if Estella has Roberta “speak” for her and Roberta tells you that Estella wants to change her will with Roberta as the

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<sup>40</sup> See generally Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 *FORDHAM L. REV.* 1453 (1994). For a discussion regarding confidentiality of communications occurring in the presence of others, see Michael G. Walsh, *Applicability of Attorney-Client Privilege To Communications Made in the Presence of or Solely To or By a Third Person*, 14 *A.L.R.* 4th 594 (1982, Supp. 1999), especially §§ 6, 8, and 10.

sole beneficiary. What if Roberta is not a relative, but instead a “caregiver” who befriended Estella four months ago?

### *Keeping Secrets*

Even if the elderly client is alone in the room with the attorney, well intentioned (or not so well intentioned), children will call the attorney subsequent to the interview and ask the attorney what occurred because they are looking out for their parent’s “best interest.” Of course, it is clear that the attorney cannot disclose any information to the children without the parent’s consent. Model Rule 1.6 “Confidentiality of Information” requires that an attorney “not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. . . .”<sup>41</sup>

As the Comments to Rule 1.6 point out, one of the “fundamental principle[s] in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.”<sup>42</sup> No matter how well intended the family members, the attorney simply cannot disclose information to them without the client’s consent. Not knowing the family dynamics, the attorney must use caution in explaining to the client about her giving approval or consent because she may feel otherwise pressured to do so, in the interest of family harmony!

The San Diego Bar Association issued an Ethics Committee Opinion in 1990 regarding an attorney who was asked by the client’s child to prepare a new will for the parent.<sup>43</sup> Who is the client? The ethics opinion concluded that the person who would be signing the will would be the client. The ethics opinion further provided that unless agreed to in advance, the child who seeks the attorney’s advice may also be considered a client. When both are thus clients, the attorney is required to disclose potential conflicts and get written informed consent for the representation. The attorney also needs to consider the competence of the testator and the possibility of undue influence or fraud.<sup>44</sup>

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<sup>41</sup> MRPC Rule 1.6 (1999).

<sup>42</sup> MRPC Rule 1.6 Cmt. 4.

<sup>43</sup> San Diego Ethics Op. 1990-3 (1990).

<sup>44</sup> *Id.* For a discussion of this opinion, see ACTEC Commentary at 170-171.

If the facts dictate that the conflict is insurmountable, the attorney would be prudent to not represent any of the clients even though they might be willing to consent.

#### IV. Who's Paying the Bill?

What will happen if the child wants to pay the attorney's bill? Candace holds her father's (Sam's) financial power of attorney and also pays many of Sam's bills with her own money, to "help out." Candace drives Sam to the attorney's office and stays in the waiting room while Sam talks to the attorney. Candace pays the attorney's bill from her personal checking account. Rule 1.8, "Conflict of Interest: Prohibited Transaction," specifically provides in subsection (f):

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.<sup>45</sup>

In order for Candace to pay the attorney's bill, the attorney must comply with Rule 1.8(f), as well as Rules 1.6 and 1.7.<sup>46</sup> Even though the attorney makes the required disclosure and gets the required consents from Sam, Candace may still feel that she is "entitled to" or is "buying" the information, when she calls the attorney and asks for a status report on the case. When told that the attorney would not disclose information, she may take exception, but Sam is the client!

The ACTEC Commentaries to Rule 1.5 note that even though someone else is paying the fee, the person "for whom the services are performed" is considered the client, the client's confidences are safeguarded and protected, and the client's instructions are followed.<sup>47</sup> The ACTEC Commentaries note that the lawyer is allowed to accept the compensation from a third party only when the client has consented after the consultation, when there is no interference with the "lawyer's independence of judg-

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<sup>45</sup> MRPC Rule 1.8.

<sup>46</sup> Rule 1.8 Cmt. 4.

<sup>47</sup> ACTEC Commentary on Rule 1.5 at 104-105.

ment or with the client-attorney relationship,” and finally, when the confidences of the client are kept.<sup>48</sup>

## V. The Helpful Relatives

There may be times when the family seeks the attorney's assistance to help the elderly person in situations beyond those already discussed in this article. Consider the following: Joseph, age 95, is in the hospital and is going to be discharged to a nursing home. The doctors doubt that Joseph will ever return home, even though Joseph always said he never wanted to be in a nursing home. Joseph and his wife, Sue, age 93, have \$200,000 in savings, plus their home. They have three adult children. The oldest, Randolph, age 70, contacts the attorney and asks the attorney to develop a Medicaid plan to transfer Joseph's assets so that he will be eligible for Medicaid. The attorney may never even talk to Joseph, and instead draws up the documents needed for the transfer. Who is the client in this situation? Who is benefitted by the attorney's actions—Joseph, Sue, the family?<sup>49</sup>

Assume instead that the attorney does talk to Joseph, and Joseph makes clear that he wants to leave his estate to his family, although it is clear that Joseph does not understand the look-back period, period of ineligibility, spousal impoverishment, community spouse resource allowance or any other integral parts of Medicaid planning. Instead Joseph tells the attorney to do whatever is necessary for Joseph to have his estate left to his family. Is this situation any easier than the first?

Sometimes the helpful relatives are not the immediate family, but may be a more remote relation. Consider this situation. The elderly person, Mrs. S, a widow with no children, turned to her cousin and his wife, Mr. and Mrs. H for help. Mrs. H took her to their attorney. The attorney drafted Mrs. S' will which named Mr. and Mrs. H as the beneficiaries, as well as a power of attorney, naming Mrs. H as the attorney-in-fact. When Mrs. S' health declined, the power of attorney was used to transfer her real property (apparently contemplating financial planning) to

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<sup>48</sup> *Id.* at 105.

<sup>49</sup> For a discussion of the ethical issues in such cases and models of handling them, *See generally*, Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 *FORDHAM L. REV.* 1453 (1994).

Mr. and Mrs. H and to title her bank accounts jointly with Mrs. H. When Mrs. S became well enough to return home, Mr. H arranged for a live-in caregiver for her, who eventually developed a close relationship with Mrs. S.

Subsequently, Mrs. S revoked the power of attorney, asked for title to her property to be reconveyed, and executed a new power of attorney naming her caregiver as attorney-in-fact. At the request of Mr. and Mrs. H, the attorney initiated a guardianship proceeding, and the psychiatric exam indicated Mrs. S needed help managing her property. Who is the client?

This situation is the subject of a Pennsylvania Informal Ethics Opinion.<sup>50</sup> The court appointed a bank to be guardian of the property. Mr. and Mrs. H fired the attorney, although the attorney remains on good terms with them. The reason the attorney sought the ethics opinion — the attorney was to be called as a witness at the hearing and her files were subpoenaed. Mr. and Mrs. H's new attorney asked the attorney to testify on behalf of Mr. and Mrs. H, and the attorney for Mrs. S subpoenaed the attorney's files regarding Mrs. S.<sup>51</sup> The ethics opinion recognized that the attorney served as attorney both for Mrs. S and for Mr. and Mrs. H. Therefore, the attorney has duties to both.<sup>52</sup> As far as the contents of the files, there could be privileged information, and the attorney needed to seek a decision by the court to answer that question. As far as testifying, the opinion found that the attorney would have to assert privilege and confidentiality for both Mrs. S and Mr. and Mrs. H. in certain areas.<sup>53</sup> There were no evil motives here, it appears just a desire to help — and look at the subsequent mess. The ethics rules *are* here for a reason.

## VI. The Family as the Client

Despite the occurrence in the practice, the rules do not recognize the family entity as the client.<sup>54</sup> Generally, under the

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<sup>50</sup> Pa. Ethics Informal Op. 98-97 (1998).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See generally Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 *LOY. U. CHI. L.J.* 403 (2000);

rules, each individual member of the family would need to have their own attorney, since an attorney cannot represent the family. The rules are designed to protect individuals and utilize the concept of family as the client undermines the provided protections. By not recognizing the family as the client, elderly people and family members may end up having their own lawyers, even though the family may be unified toward the common goal. This not only would increase the costs to the family members, as each has to pay her own attorney's fees, it may also cause a division within the family when each receives separate advice.

In a new proposed comment to Rule 1.14, The ABA Ethics 2000 Commission has recognized that circumstances exist when a family member might be providing assistance to the elderly person, not be the client, and yet be privy to confidential information.<sup>55</sup> The comment recognizes that on occasions others may be present in the interview or be talking to the lawyer. Even though others may thus be participating in the relationship, the client is still the decision-maker.<sup>56</sup> According to the accompanying reporter's memo, the comments add to the discussion the risks that are involved in having others participate when the client has diminished capacity. The reporter refers to having others present a "common practice" and indicates the change is "recommended to encourage lawyers to seek such involvement since [the] practice may" assist the attorney in representing the client.<sup>57</sup>

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Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 *FORDHAM L. REV.* 1453 (1999). The topic was also the subject of a Symposium, *Should The Family Be Represented as a Entity*, 22 *SEATTLE U.L. REV.* 31 (1998).

<sup>55</sup> Ethics 2000 Commission proposed comment to Model Rule 1.14.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the client-attorney evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf. MRPC Rule 1.14 Cmt. 3 (Proposed Draft 2000) <<http://www.abanet.org/cpr/rule114draft.html>>.

<sup>56</sup> *Id.*

<sup>57</sup> Reporter's memo to draft addition to MRPC 1.14, Reporter's Explanation of Changes (visited August 6, 2000) <<http://www.abanet.org/cpr/rule114memo.html>>.

## **VII. Conclusion**

This brief essay notes, there are some significant ethical issues that can be encountered on a daily basis in an elder law practice, especially those occurring in the context of the family dynamic. Attorneys are well-served to have an intimate knowledge of the Rules of Professional Conduct, to keep copies of the ACTEC Commentaries on their desks, and to take proper precautions to protect the client's interest, even when the family is well-intentioned, and working for the good of the elderly person. A discussion at the outset with the potential clients, appropriate documents, signed waivers, a clear decision as to who is the client, and appropriate ground rules will go a long way to avoid ethical problems when dealing with elderly clients and their families.

